FILE COPY

JUN 26 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 10 Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF WYOMING AND THE OHIO OIL COMPANY,
Defendants.

DEFENDANTS' PETITION FOR REHEARING.

DONALD R. RICHBERG,
Washington, D. C.,
C. R. ELLERY,
Cheyenne, Wyo.,
Attorneys for Defendants State of Wyoming and The Ohio Oil Company.
NORMAN B. GRAY,
Cheyenne, Wyo.,
Attorney General of the State of Wyoming.
A. M. GEE,
HAL W. STEWART,
Findlay, Ohio,
HAROLD H. HEALY,
W. H. EVERETT,
Casper, Wyoming,
Attorneys for Defendant The Ohio Oil Company.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Petition for Rehearing 1-3

Argument in Support of Petition for Rehearing 5-13

Table of Cases Cited.

D. Ginsberg & Sons v. Popkin, 285 U. S. 204 12

Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U. S. 634 ..... 5, 7, 9

Leavenworth, Lawrence & Galveston R. R. Co. v. United States, 92 U. S. 733 11

Martinez v. International Banking Corporation, 220 U. S. 214 1

Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264, 269 1

Petition of Public National Bank of New York, 278 U. S. 101 12

United States v. Minnesota, 270 U. S. 181 9

United States v. Morrison, 240 U. S. 192 5

Washington Market Co. v. Hoffman, 101 U. S. 112 ... 12

Wilcox v. Jackson, 13 Peters 498 11

Statutes.

Enabling Act of Wyoming, Sec. 4 ..... 5, 6, 7

Enabling Act of Wyoming, Sec. 5 ..... 5, 6, 7, 8, 9, 10, 11

Enabling Act of Nevada 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 10 Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF WYOMING AND THE OHIO OIL COMPANY,
Defendants.

DEFENDANTS' PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The Court has not rendered final judgment herein but has filed an opinion disposing of the issue of *title*, and has recommitted the case to the Master for further proceedings in conformity with its opinion on the question of the right to recover a money judgment on account of defendant Company's oil operation. In the circumstances, the defendants are probably not required to file a petition for rehearing. Tested by the decisions of this Court dealing with judgments of State Courts, the action of the Court, taken on June 2, 1947, did not constitute a final judgment because this does not appear from the "face of the record". *Norfolk & Suburban Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269; *Martinez* v. *International Banking Corporation*, 220 U. S. 214.

But, after consideration, we have decided that while defendants may not rest under the duty to file a petition for rehearing within the time limited within the applicable rule, they are entitled to do so if they wish to complain of the rulings that the Court has already made on the issue of title. Accordingly, the defendants respectfully present this petition for rehearing.*

I.

The Court erred in holding that plaintiff has title to Section 36 herein involved and in overruling defendants' exceptions to the Master's findings and conclusions in respect to the title thereto.

II.

The Court erred in failing to hold that the terms of the Wyoming Enabling Act vested immediately in the State an indefeasible right in whatever lands might be found on later survey to lie within Section 36.

III.

The Court erred in its construction of Section 5 of the Enabling Act and in failing to hold that said Section, when considered in connection with Section 4, created an immediate reservation "for school purposes only", in favor of a named grantee, the State of Wyoming.

IV.

The Court erred in failing to hold that the effect of creating an immediate reservation "for school purposes only" for the benefit of a named grantee, the State of Wyoming,

* Defendants also submit an argument in support of this petition for rehearing. This argument has been bound under the same cover, *post*, pp. 5-13.

was to preclude the Congress from making any other and subsequent disposition of the same lands.

This petition for rehearing is respectfully submitted with the prayer that the opinion of the Court of date June 2, 1947, be set aside and another opinion substituted therefor upholding title of the defendants to the land in controversy, and for general relief.

Respectfully submitted,

DONALD R. RICHBERG,
Washington, D. C.,
C. R. ELLERY,
Cheyenne, Wyo.,
Attorneys for Defendants State of Wyoming and The Ohio Oil Company.

NORMAN B. GRAY,
Cheyenne, Wyo.,
Attorney General of the State of Wyoming.

A. M. GEE,
HAL W. STEWART,
Findlay, Ohio,
HAROLD H. HEALY,
W. H. EVERETT,
Casper, Wyoming,
Attorneys for Defendant The Ohio Oil Company.

I, Donald R. Richberg, Counsel for the defendants in the above entitled cause, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated June ____, 1947.

DONALD R. RICHBERG.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 10 Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF WYOMING AND THE OHIO OIL COMPANY,
Defendants.

DEFENDANTS' ARGUMENT IN SUPPORT OF THEIR PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Defendants respectfully submit the following argument in support of their Petition for Rehearing.

The Court erred in applying the holding made in the Heydenfeldt and Morrison cases to the entirely different language of the Wyoming Enabling Act.

It may be assumed that if Section 4 of the Enabling Act stood alone, the claim of the defendants would be defeated by the ruling made in *Heydenfeldt* v. *Daney Gold and Silver Co.*, 93 U. S. 634, reaffirmed in *United States* v. *Morrison*, 240 U. S. 192. But Section 4 does not stand alone. The words of "reservation" contained in Section 5 implement and add to the words of grant contained in Section 4.

The words of reservation contained in Section 5 became immediately effective. The legal effect of the reservation may be debated but not the fact that the reservation was made and became effective as of the date of the enactment of the Enabling Act—whatever may have been its legal effect. That cannot be denied and, as we understand, has not been denied. The plaintiff claims simply that a reservation for one public purpose can be changed later into a reservation for another public purpose. It may be assumed that this is true so long as the reservation is simply a general one for some public purpose, instead of being a specific reservation for the benefit of a named grantee.

We are dealing here with a reservation specifically made for the benefit of a named grantee and when the words of reservation are added to the words of grant (made in Section 4), the right of the named grantee vests at once perforce the reservation. The reservation was made, not only for a named public purpose, but for the benefit of a named grantee, and the effect was to vest immediately an indefeasible right in the named grantee—the State of Wyoming. Such a reservation is to be distinguished from one for some general public purpose without mention of any beneficiary.

If in this case the words of reservation contained in Section 5 did not become immediately effective in respect to the unsurveyed lands, vesting an indefeasible right in the State of Wyoming, named as a beneficiary of the reservation, then they could never become effective as to any of the lands. They constitute, under that view, mere surplusage, adding nothing to the words of grant contained in Section 4. We say this because as to all the lands that were *surveyed* prior to the enactment of the Enabling Act and as to all lands that were subsequently surveyed (before being otherwise disposed of), the title of Wyoming vested as a grantee under Section 4, and this would have been true

even if Section 5 had not been made a part of the Enabling Act. Immediately upon survey, the rule of construction announced in the *Heydenfeldt* and *Morrison* cases would have become applicable in favor of Wyoming under Section 4 of the Act. The provisions of Section 5 prohibiting preemption, homestead entry or any other entry under the land laws of the United States and creating a reservation for school purposes only, for the benefit of the State of Wyoming, applied to the *unsurveyed* Sections 16 and 36 or they applied to nothing. Unless thus construed, they perform no office and serve no purpose.

The Court's construction of Section 5 leaves it without any effective field of operation whatsoever. It could add nothing to the rights of Wyoming once the lands were surveyed because upon survey of any of the lands the title of Wyoming vested as a grantee under Section 4. It would be a misnomer to describe a title already vested under a *grant* as a *"reservation."* To say the least, it would be superfluous for the Congress to say that lands already conveyed to the State, with its title fully attached, were not to be thereafter subject to any entry under the laws of the United States and were to constitute a "reservation" for the benefit of the State.

The clear intent of the Congress in enacting Section 5 was to defeat the "rule of construction" announced in the *Heydenfeldt* case; that is, to protect the *unsurveyed* lands from the effect of the rule announced in that case. The clear purpose of the "words of reservation" was to protect Wyoming in respect to unsurveyed lands pending the making of a survey which would clearly vest its title under Section 4. The words of reservation constituted a security or a guaranty for the grant. The effect of Section 5 was to guarantee that the lands would be on hand undisposed of when they might be surveyed, with the result that they would then pass under Section 4 to the named grantee.

If the words of reservation contained in Section 5 did not have the effect here stated, then they had no effect. They amount to nothing more than an empty declaration of policy, vesting no right—a declaration of policy that could be changed into a conflicting declaration at any later time prior to survey.

We respectfully submit that the holding of the Court to the effect that the words of reservation contained in Section 5 "should be construed as an affirmation of the State's interest as opposed to the claims of such *individuals*" is clearly erroneous. Private entries were specifically interdicted by the first part of Section 5, declaring that "such lands shall not be subject to preemption, homestead entry or any other entry under the land laws of the United States." No additional words were needed to protect these lands from private entries.

In the absence of a specific provision for the reservation "for school purposes only" and for the benefit of Wyoming, it might be plausibly contended that the language of Section 5, prohibiting preemption, homestead entry or other entry under the land laws of the United States, merely created an obligation on the part of the United States not to permit an acquisition of title to the lands by private entries and, further, that such language, standing alone, would not prohibit the United States from disposing of the same lands for its own general public purpose. But Section 5 effected not merely a general public reservation "for school purposes only," but a specific reservation for the benefit of the grantee named—the State of Wyoming. This constituted an immediate "disposition" of the lands for the benefit of Wyoming and the grant and reservation having been immediately accepted, it was no longer competent for the Congress or any one acting under its authority to use the same lands for the purpose of setting up or creating some other and different reservation, displacing and sup-

planting the reservation already made and accepted for the specific benefit of the named grantee. The effect of Section 5 was not merely to create a reservation for a stated purpose but to confer a right on the State of Wyoming that could not be divested by any subsequent act of Congress, or by any one acting under its authority.

It may be admitted that the power of the Congress to commit the lands to one public purpose implies the power under changed considerations of policy to later commit them to another public purpose. But once a reservation is created for the benefit of the specific party, as distinguished from some general public purpose, an indefeasible right is created and there can be no change of policy. At all events, apart from considerations of power, the applicable legislation should not be *construed* as an attempt to effect a change of policy in derogation of rights conferred on the State of Wyoming at the time the reservation was created for its specific benefit. Constitutionality is not the sole test to be applied to this statute; true, faithful and just construction of the statute must also be considered. *United States* v. *Minnesota*, 270 U. S. 181. The question involved is not solely one of *power* but one of *construction*.

In the *Heydenfeldt* case this Court held that, notwithstanding the words of grant contained in the Nevada Enabling Act, "Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests." (93 U. S. 640.) This reasoning cannot be correctly applied to the Wyoming Enabling Act because by Section 5 of that Act the Congress *then* enacted legislation "to promote the public interests" in a given way then selected by it. *Present* legislation made a part of the Enabling Act itself was supplied to take the place of any *subsequent* legislation to promote "the public interest." The lands were immediately dedicated to and reserved for "the public interest" mentioned in the Enabling Act; that

is, "for school purposes only" and for the benefit of the named grantee, the State of Wyoming.

To apply the holding in the *Heydenfeldt* case, reaffirmed under a similar statute in the *Morrison* case, amounts to reading out of the Wyoming Enabling Act language that was undoubtedly made a part of that Act for the very purpose of displacing the "rule of construction" applied in the *Heydenfeldt* case. It was competent for the Congress to change the rule of construction applied by this Court in the *Heydenfeldt* case later, and the language of the Wyoming Act makes it plain that this is precisely what Congress intended to do. Instead of permitting the Wyoming grant to be displaced by a *subsequent* disposition to promote "the public interest," as was true of the statute construed in the *Heydenfeldt* case, the Congress selected in the Wyoming case the "public interest" that was to be promoted and created an immediate reservation to promote that particular public interest, and the effect was to vest an indefeasible interest in the named beneficiary—the State of Wyoming.

The Court in its opinion, after referring to the fact that "The powers of the Federal Government with respect to the public lands, as contrasted to the claims of individuals asserted under the land laws, are nowhere mentioned in the section"—referring to Section 5—concludes that "the section should not be construed as a limitation on those powers." We respectfully submit that the case is clearly one where words of inclusion amount to words of exclusion. The setting-up of a reservation for a specific purpose for the benefit of the State of Wyoming excludes the power to make at a later time a reservation of the same lands for the benefit of any one else. To state the name of the beneficiary of the reservation amounts to a statement that all other and unnamed beneficiaries, including the United States or any one else, were excluded.

Congress had the power to reserve Sections 16 and 36 in each township for some specific use, and when this was done, as in Section 5 of the Wyoming Enabling Act, the lands were thereby immediately reserved for school purposes only, and the obligation rested upon the Government to see that the reservation was not diverted for any other purpose. In other words, the specific language, "reserved for school purposes only," is not to be ignored. As early as *Wilcox* v. *Jackson*, 13 Peters 498, this Court had held:

> "* * * that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands."

In *Leavenworth, etc. R. R. Co.* v. *United States*, 92 U. S. 733, this Court held:

> "Every tract set apart for some special use is reserved to the Government to enable it to enforce that use and there is no difference, in this respect, whether it be appropriated for Indian occupancy or for other purposes, there is an equal obligation resting upon the Government to see that neither class of reservations is diverted from the uses to which it was assigned."

Congress was familiar with the foregoing rule as announced by this Court. Congress knew that by the previous provisions of Section 5, acquisition by individuals of these school lands, surveyed or unsurveyed, had been clearly and expressly barred and prohibited.

It may not be presumed that Congress intended to include in Section 5 a superfluous and meaningless provision. The presumption under the rule frequently announced by this Court is to the contrary, and it should be presumed that Congress, by the use of the phrase "but shall be reserved for school purposes only," intended that said phrase should have purpose, significance, and meaning.

In *Petition of Public National Bank of New York*, 278 U. S. 101, this Court said, in part:

> "* * * In other words, we are asked to ignore the quoted words and read the section as though they were not there.
>
> "But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, Sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." ' *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, * * *"

In *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, this Court said, in part:

> "* * * We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. * * *"

In *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, this Court said, in part:

> "* * * The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115, 25 L. Ed. 782; *Ex parte Public Bank*, 278 U. S. 101, 104, 49 S. Ct. 43, 73 L. Ed. 202."

It was certainly fair and proper for Congress to expressly warn individuals that they could not acquire unsurveyed lands against the State of Wyoming. It was unnecessary for Congress to include an express prohibition against the Government itself after having specifically stated that the Sections 16 and 36 were reserved for school purposes only.

We respectfully submit that this Petition for Rehearing of Defendants' Exceptions to the Special Master's Findings and Conclusions in respect to the title to the Section 36 here involved should be granted, and that upon said rehearing, this Court's decision and opinion of June 2, 1947, be set aside and withdrawn, and that a decree favorable to defendants and one quieting Wyoming's title to said Section 36 be entered.

Respectfully submitted,

DONALD R. RICHBERG,
Washington, D. C.,
C. R. ELLERY,
Cheyenne, Wyo.,
Attorneys for Defendants State of Wyoming and The Ohio Oil Company.

NORMAN B. GRAY,
Cheyenne, Wyo.,
Attorney General of the State of Wyoming.

A. M. GEE,
HAL W. STEWART,
Findlay, Ohio,
HAROLD H. HEALY,
W. H. EVERETT,
Casper, Wyoming,
Attorneys for Defendant The Ohio Oil Company.